ORIGINAL

BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

KRISTIN K. MAYES, Chairman
GARY PIERCE
PAUL NEWMAN
SANDRA D. KENNEDY
BOB STUMP

IN THE MATTER OF THE APPLICATION OF JOHNSON UTILITIES, LLC, DBA JOHNSON UTILITIES COMPANY FOR AN INCREASE IN ITS WATER AND WASTEWATER RATES FOR CUSTOMERS WITHIN PINAL COUNTY, ARIZONA.

DOCKET NO. WS-02987A-08-0180

JOHNSON UTILITIES' (1) MOTION TO STRIKE PRE-FILED DIRECT TESTIMONY OF DAVID ASHTON ON BEHALF OF INTERVENOR SWING FIRST GOLF; AND (2) RESPONSE TO SWING FIRST GOLF'S MOTION FOR LEAVE TO FILE SUP-PLEMENTAL DIRECT TESTIMONY

(Expedited Oral Argument and Ruling Requested)

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Pursuant to the August 15, 2008, Rate Case Procedural Order ("Procedural Order") and Rules 402 and 403 of the Arizona Rules of Evidence, Johnson Utilities, LLC, dba Johnson Utilities Company ("Johnson Utilities" or the "Company") hereby objects to the pre-filed Direct Testimony of David Ashton filed February 3, 2009 (the "Ashton Testimony") in the above-captioned docket on behalf of intervenor Swing First Golf, LLC, ("SFG') and hereby moves that the Ashton Testimony be stricken. In the alternative, Johnson Utilities requests that: (i) because of the character and nature of the testimony as described herein, the testimony be stricken as evidence and considered as public comment; or (ii) SFG be ordered to revise and resubmit the Ashton Testimony to address only those issues relevant in a rate case before the Arizona Corporation

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Commission ("Commission") and only those matters of which Mr. Ashton has direct personal knowledge. Additionally, on February 17, 2009, SFG filed a Motion for Leave to File Supplemental Direct Testimony ("Supplemental Ashton Testimony"). SFG's Motion should be denied for the reason that the Supplemental Ashton Testimony relates to matters outside the scope of the rate case proceeding.

Because Johnson Utilities' rebuttal testimony must be filed by March 6, 2009, Johnson Utilities respectfully requests an expedited oral argument and ruling on this motion to strike the Ashton Testimony and on the motion relating to the Supplemental Ashton Testimony.

I. INTRODUCTION.

Johnson Utilities recognizes that greater latitude is given to customer-intervenors in rate cases, that the Arizona Rules of Evidence are more liberally construed with respect to the admissibility of hearsay, opinion and other evidence, and that the Commission weighs all such evidence according to its probative value and relevancy to the matters being decided. Johnson Utilities also recognizes that a motion to strike testimony is uncommon and that the Commission grants such requests only under compelling circumstances. Notwithstanding, it is doubtful that in the history of the Commission's adjudication of rate cases, a party in a rate case has pre-filed testimony that is so patently violative of the evidentiary standards requiring relevancy, direct personal knowledge and the exclusion of testimony which is purely inflammatory. Nor has any party so blatantly attempted to commandeer a general rate case in order to bolster its own position in a pending complaint case by reasserting claims asserted in the complaint case.[1] The Ashton Testimony is so far out of bounds (and the Supplemental Ashton

[1] Swing First Golf filed a formal complaint against Johnson Utilities in Docket No. WS-02987A-08-0049. The formal complaint involves whether SFG was correctly billed for the actual quantities of effluent and Central Arizona Project water delivered by Johnson Utilities, including applicable meter charges, Water Quality Assurance Revolving Fund taxes, and transaction privilege taxes.

Testimony further still) that it should be stricken from the record. It is not enough to simply give the testimony little or no weight.

II. THE LEGAL STANDARDS APPLICABLE TO A RATE CASE AND THE ADMISSION OF EVIDENCE.

A. The Purpose of a Rate Case is for the Commission to Discharge its Constitutional Authority to Set Just and Reasonable Rates for a Utility.

The Arizona Constitution requires the Commission to "prescribe just and reasonable classifications to be used and just and reasonable rates and charges to be made and collected, by public service corporations within the State for service rendered therein...." Ariz. Const. Art. XV, § 3; see also A.R.S. § 40-361(A). "[T]he Commission is constitutionally mandated to set fair rates of return on fair value base of public service utilities." *Arizona Corp. Comm'n. v. Citizens Utilities Company*, 120 Ariz. 184, 188, 584 P.2d 1175, 1179 (Ct. App. 1978) (*citing* Ariz. Const. Art. XV, §§ 3, 14). When determining just and reasonable rates, the Commission must consider "whether the company is receiving a fair rate of return on its investment which in turn requires a consideration of the 'fair value' of the company's property." *Mountain States Telephone and Telegraph Co. v. Arizona Corp. Comm'n.*, 137 Ariz. 566, 568, 672 P.2d 495, 497 (Ct. App. 1983).

"[T]he Commission should focus on the principle that 'total revenue, including income from rates and charges, should be sufficient to meet a utility's operating costs and to give the utility and its stockholders a reasonable rate of return on the utility's investment.'" *Residential Utility Consumer Office v. Arizona Corporation Comm'n.*, 199 Ariz. at 591, 20 P.3d at 1172 (*quoting Scates v. Arizona Corp. Comm'n.*, 118 Ariz. 531, 533-34, 578 P.2d 612, 614-15 (Ct. App. 1978)). While the Constitution "does not establish a formula for arriving at fair value, it does require such value to be found and used as the base in fixing rates. The reasonableness and justness of the rates must be related to this finding of fair value." *Simms v. Round Valley Light & Power Co.*, 80 Ariz.

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145, 151, 294 P.2d 378, 382 (1956) (emphasis added). Moreover, rates cannot be considered just and reasonable, as required by the Constitution, if they do not provide a reasonable rate of return to the utility. *Scates*, 118 Ariz. at 534, 578 P.2d at 615.

One of the primary stated purposes of SFG's intervention in the rate case is to ask the Commission to penalize Johnson Utilities by reducing its return on equity for alleged grievances set forth in SFG's complaint case.[2] Such a request is plainly outside of the Commission's constitutional mandate related to rate making. The Commission's rate determination is contingent upon an evaluation of a company's rate base and a determination of a fair and reasonable rate of return thereon. It does not involve a subjective appraisal of the Company's character, or allow the Commission to penalize a company's constitutionally-mandated fair and reasonable rate of return. Therefore, the purported evidence given in support thereof is outside the scope of the relief that can be granted in the rate case, and should be stricken.

Another primary purpose of SFG's intervention (and of the testimony and evidence presented) is to seek the revocation of Johnson Utilities' certificate of convenience and necessity ("CC&N"), as set forth in its recommendation 8.[3] However, revocation of a CC&N likewise falls outside the scope of the relief that can be granted in a rate case.[4]

Of course, the real but unstated purpose of SFG's intervention in the rate case is to try to force Johnson Utilities to capitulate to SFG's demands in the complaint case. However, Johnson Utilities is vigorously defending its actions in the complaint case because the Company believes it correctly billed SFG for effluent and Central Arizona Project ("CAP") water delivered to SFG, and where mistakes in billings occurred as a result of simple human errors, the Company corrected those mistakes and gave proper

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[2] Ashton Testimony at page 22, recommendation 7.
[3] *Id.* at 23, recommendation 8.
[4] Pursuant to A.R.S. § 40-252(A), an action revoke a CC&N requires prior notice to the corporation effected and an opportunity to be heard, as upon a complaint.

credits to SFG. At no time has there ever been any fraud or illegality in bills rendered by Johnson Utilities.

B. Testimony and Evidence Must be Relevant, and Inflammatory Testimony and Evidence Should be Excluded if the Probative Value is Substantially Outweighed by the Danger of Unfair Prejudice.

Relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *See* Rule 401, Arizona Rules of Evidence (emphasis added). Irrelevant evidence is not admissible and should not be considered in a judicial or quasi-judicial proceeding. *See* Rule 402, Arizona Rules of Evidence. In addition, even relevant evidence should be excluded if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *See* Rule 403, Arizona Rules of Evidence; *see also Estate of Sims v. Industrial Comm'n. of Arizona*, 138 Ariz. 112, 114-15, 673 P.2d 310, 312-13 (Ct. App. 1983) (affirming that an administrative law judge correctly excluded evidence that would confuse, delay, and needlessly present cumulative evidence).

Even a cursory reading of the Ashton Testimony leads to the immediate conclusion that the testimony and accompanying exhibits are wholly irrelevant to the issues properly before the Commission in a rate case. Moreover, the Ashton Testimony is loaded up with inflammatory statements and extraneous exhibits undoubtedly intended to negatively impact the rate case in order to secure an advantage for SFG in its complaint case.[5] Notwithstanding the Commission's more liberal application of the

[5] As further illustration of this tactic, one need only look to SFG's motion to compel discovery filed November 21, 2008, which spends page after page bashing Johnson Utilities. Johnson Utilities correctly identified the true motivation of SFG in its December 2, 2008, response to the motion which states as follows:

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Arizona Rules of Evidence to Commission proceedings, the misleading evidence that SFG is attempting to put into the record through the Ashton Testimony is designed to unfairly prejudice Johnson Utilities, unduly broaden the scope of the rate case, and inflame the Commission and the public.

C. The Stated Purpose of the Ashton Testimony is Outside the Proper Scope of a Rate Case.

Mr. Ashton begins his testimony as follows:

> The purpose of my testimony is to bring to the Commission's attention certain activities and practices by George Johnson and his Utility that the Commission should consider as part of the rate case. I then recommend how the Commission should compensate the victims—Utility's customers—and then make sure that Utility's behavior is never repeated.[6] (Emphasis added)

Right from the outset, SFG's testimony veers off in a direction that is outside the scope of a rate case. As set forth above, the purpose of a rate case is to establish just and reasonable rates and charges for a utility, not to "compensate" customers for "certain activities and practices" of the utility. SFG's testimony lacks any analysis of the new rates and charges for water service proposed by Johnson Utilities. Rather, SFG simply dumps its pending billing dispute with Johnson Utilities into the rate case, obviously in hopes of garnering some leverage against the Company. SFG even raises a land

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The purported purpose of the Motion is for Swing First to obtain discovery in preparation for the April 23, 2009, hearing on JU's rate case application. Yet, the first nine (9) pages of Swing First's Motion is page after page of what can only be described as diatribe and "bashing" of JU, its affiliates, and its owner, George H. Johnson, based on irrelevant and unsubstantiated allegations. Moreover, Swing First attached to its Motion an additional 17 pages containing various news articles relating to JU and its affiliates. Rather than describing these allegations by reiterating them in this Response, JU maintains that the inclusion of these allegations and news articles is not for the purpose of obtaining necessary and relevant discovery, but rather to: (i) inflame the situation by ascribing improper motives to JU; (ii) put into the public docket information that is not subject to evidentiary rules or subject to cross examination; (iii) provide a preview of positions it may take in the rate case that would otherwise be precluded as outside the scope of the rate case; (iv) bolster its position in the Complaint Proceeding; and (v) influence the Commission's view of JU in the hope that the Commission will lower the rates that Swing First is obligated to pay.

[6] Ashton Testimony at page 2, lines 3-7.

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transaction which has absolutely no connection to Johnson Utilities other than the fact that George Johnson is both an owner of Johnson Utilities and certain of the companies involved in the land transaction. It is costly for Johnson Utilities to address SFG's irrelevant and inflammatory testimony and exhibits in the rate case, both in terms of data requests and the preparation of rebuttal testimony. SFG should address its billing dispute with Johnson Utilities in the complaint case that SFG filed, and not waste the collective time and financial resources of the Commission and the parties in responding to inappropriate and irrelevant testimony and exhibits in the rate case.

III. THE ASHTON TESTIMONY IS OVERLOADED WITH IRRELEVANT STATEMENTS AND OPINION, STATEMENTS WHICH MR. ASHTON IS NOT COMPETENT TO MAKE; INFLAMMATORY HEARSAY AND CONJECTURE, ALL OF WHICH SHOULD BE STRICKEN.

The Ashton Testimony is replete with irrelevant statements and opinion, statements which are not based upon direct personal knowledge, and inflammatory hearsay and conjecture, all of which should be stricken from evidence. Johnson Utilities will address the most egregious portions of the Ashton Testimony, without waiving its objections regarding the balance of the testimony.[7] It should also be noted that the headings themselves constitute improper testimony (they are not part of the questions and answers) and are inflammatory, and should likewise be stricken.

A. Section II of the Ashton Testimony Discusses La Osa Ranch which has No Connection to Johnson Utilities.

It is clear from the pejorative heading "*George Johnson—The Man Behind the Curtain*" that SFG believes this case is not so much about Johnson Utilities and its rates and charges as it is about one of the Company's owners, George Johnson. This is clearly

[7] Because of the voluminous number of objections that Johnson Utilities has to the Ashton Testimony, and the amount of paper it would take to address each and every objection in this Motion to Strike, the Company will only address the major objections which form the basis of the motion. The fact that Johnson Utilities has not raised an objection should not be considered a waiver of its right to object. The Company may raise other objections in its reply in support of this motion, at oral argument or at hearing.

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evident in the unrelenting diatribe concerning Mr. Johnson throughout the Ashton Testimony, as well as the newspaper articles and news releases attached as exhibits. Section II of the Ashton Testimony discusses activities allegedly occurring on La Osa Ranch in southern Arizona, a property once controlled by Mr. Johnson and/or companies he controls, which is located far outside the CC&N of Johnson Utilities and which has no connection to Johnson Utilities. For these reasons, as more fully discussed below, Section II of the Ashton Testimony should be stricken together with Exhibits DA-1, DA-2 and DA-3.

1. Arizona Department of Environmental Quality News Release (Exhibit DA-1).

The Ashton Testimony discusses and attaches as Exhibit DA-1 a copy of an Arizona Department of Environmental Quality ("ADEQ") news release dated December 20, 2007, regarding a settlement between ADEQ, George Johnson, certain of Mr. Johnson's companies, and other defendants arising out of activities allegedly occurring on the La Osa Ranch in southern Arizona. However, there are at least three fatal defects with this testimony and the news release upon which it is based. First, the referenced settlement did not involve Johnson Utilities, nor is there any assertion in the news release or the Ashton Testimony that the settlement (or the amount paid pursuant to the settlement) impacted Johnson Utilities or its rate payers in any way.[8] Thus, the testimony regarding the settlement and the ADEQ news release are wholly irrelevant to the rate case. Second, Mr. Ashton, who is living abroad in Europe, has no direct personal knowledge regarding the news release, the settlement, or the underlying facts and circumstances that led to the settlement. In fact, Mr. Ashton merely paraphrases and quotes from the news release. Without first-hand knowledge, Mr. Ashton is not

[8] Johnson Utilities was not a party to the ADEQ lawsuit involving La Osa Ranch, nor was the Company responsible for any portion of the monetary settlement that resolved the lawsuit. Moreover, it should also be noted that the decision to settle the case and pay a monetary penalty without admission of liability was made by the insurance carrier of the companies that were involved.

competent to testify regarding the ADEQ news release or the settlement. Third, the news release is hearsay and should be excluded because Johnson Utilities has no opportunity for cross-examination on the contents of the news release. For these reasons, Exhibit DA-1 and the Ashton Testimony quoting and paraphrasing Exhibit DA-1 at page 2, line 15, through page 3, line 24, should be stricken. In the event the Commission elects to take official notice of the news release for whatever evidentiary value it may have, the news release stands on its own without the need for any testimony by Mr. Ashton.

2. Phoenix Magazine Article (Exhibit DA-2).

The Ashton Testimony discusses and attaches as Exhibit DA-2 a February 2008 article from Phoenix Magazine by columnist Jana Bommersbach regarding activities allegedly performed by Mr. Johnson and/or companies he controls on the La Osa Ranch. This testimony and exhibit suffer from the same fatal defects discussed above, namely: (i) the activities allegedly occurring on the La Osa Ranch did not involve Johnson Utilities, nor did they impact Johnson Utilities or its rate payers in any way, so the article is wholly irrelevant to the rate case; (ii) other than reading the Phoenix Magazine article, Mr. Ashton has no direct personal knowledge regarding the alleged activities discussed in the article, so he is not competent to present testimony regarding the subject matter of the article; and (iii) the Phoenix Magazine article is hearsay, and Johnson Utilities has no opportunity for cross-examination on the contents of the article. For these reasons, Exhibit DA-2 and the Ashton Testimony paraphrasing Exhibit DA-2 at page 3, lines 25-32, should be stricken.

3. Department of Justice News Release (Exhibit DA-3).

The Ashton Testimony discusses and attaches as Exhibit DA-3 an October 7, 2008, news release by the Department of Justice ("DOJ") regarding a settlement pertaining to activities allegedly occurring on the La Osa Ranch. Once again, this testimony and exhibit suffer from the same fatal defects discussed above, namely: (i) the

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activities allegedly occurring on the La Osa Ranch did not involve Johnson Utilities, nor did they impact Johnson Utilities or its rate payers in any way, so the DOJ news release is wholly irrelevant to the rate case; (ii) other than reading the DOJ news release, Mr. Ashton has no direct personal knowledge regarding the alleged activities discussed in the news release, so he is not competent to present testimony regarding the subject of the news release; and (iii) the news release is hearsay, and Johnson Utilities has no opportunity for cross-examination on the contents of the news release. Thus, Exhibit DA-3 and the Ashton Testimony paraphrasing Exhibit DA-3 at page 4, lines 1-10, should be stricken. In the event the Commission elects to take official notice of the news release for whatever evidentiary value it may have, the news release stands on its own without the need for any testimony by Mr. Ashton.

B. Section III(A) of the Ashton Testimony Merely Repeats the Allegations in SFG's Complaint Against Johnson Utilities in Docket WS-02987A-08-0049.

In Section III(A) of the Ashton Testimony, SFG essentially "dumps" its complaint case into the rate case. Apparently, SFG believes that by so doing it can create leverage to force Johnson Utilities to capitulate to its demands in the complaint case. Almost every question and answer in the 12 pages that comprise Section III (A) pertains to issues or claims that SFG has asserted in its billing dispute with Johnson Utilities.[9] The following question and answer, which comes at the very end of Section III(A), is particularly enlightening regarding SFG's true motivation:

> Q. ARE YOU ASKING THE COMMISSION TO PROVIDE YOU SPECIFIC RELIEF IN THIS CASE?
>
> A. No. The Commission will be able to provide me relief in the complaint case that I have pending against Johnson Utilities in Docket No. WS-02987A-08-0049.[10]

[9] On December 4, 2008, Johnson Utilities filed a Motion for Summary Judgment in the complaint case. Oral Argument was held on February 2, 2009, and the parties are awaiting a ruling from the Administrative Law Judge.
[10] Ashton Testimony at page 16, lines 5-8.

What then is the rationale for including the 12 pages of testimony that preceded the question and answer? The obvious answer is that SFG is trying to create leverage in the complaint case by raising the issues in the rate case, where it has no stated expectation of relief from the Commission. If SFG wants to provide public comment in the rate case and repeat allegations contained in its complaint, there may be little that can be done to stop such action. However, SFG should not be allowed to abuse the Commission' procedures and litigate its complaint in the rate case. Accordingly, Section III(A) of the Ashton Testimony should be stricken in its entirety from page 4, line 11, through page 16, line 8.

A separate and additional serious problem exists with portions of the testimony in Section III(A)—Mr. Ashton provides testimony regarding matters of which he has no direct personal knowledge and of which he is not qualified to testify. First, when asked at the bottom of page 6 of his testimony what Johnson Utilities is doing with the treated effluent it produces that is not delivered to Swing First, Mr. Ashton responds that "Utility is the only party that can really answer this question."[11] Yet, Mr. Ashton goes on to answer the question by speculating that Johnson Utilities is selling some effluent to irrigation customers at illegal rates and pumping other effluent it produces into the ground. If Johnson Utilities is the only party that can answer the question, then Mr. Ashton's testimony at page 6, line 22, through page 7, line 4, is irrelevant and should be stricken. In addition, Mr. Ashton has no legal or factual basis to assert that Johnson Utilities is providing effluent to other customers at illegal rates.

Second, when asked at the top of page 7 of his testimony why Johnson Utilities would produce treated effluent and pump it into the ground, Mr. Ashton responds: "I don't pretend to be an expert."[12] He then speculates that Johnson Utilities is trying to

[11] *Id.* at page 7, line 1.
[12] *Id.* at line 7.

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create long-term storage credits, and quotes explanatory material from the Arizona Department of Water Resources website on long-term storage credits. He concludes his answer by stating: "Again, I am not a water expert, but it would seem that this would be of great value to Utility."[13] Mr. Ashton is correct. He is not an expert on Arizona water law or long-term storage credits, and his testimony on this issue at page 7, lines 5-24, should be stricken.

Third, when asked at the middle of page 8 of his testimony whether Johnson Utilities could be violating Arizona laws, Mr. Ashton speculates once again:

> It could be. Again, I am not an expert on water law, but the ADWR web page I referenced does state that storage credits are only available if "The water cannot reasonably be used directly, per A.R.S. § 45-802.01(22)." Swing First has been ready, willing, and able to directly use Utility's treated effluent for 100% of its irrigation needs.[14] (Emphasis added)

Mr. Ashton is not an expert of Arizona water law, nor is he an attorney. His speculation regarding Johnson Utilities' compliance with A.R.S. § 45-802.01(22) should be stricken at page 8, lines 9-13, because it is prejudicial and irrelevant (*i.e.*, it goes to issues raised in SFG's complaint case), and because Mr. Ashton is not qualified to provide the testimony.

C. Sewer System Overflow—Section III(B) of the Ashton Testimony Paraphrases a Newspaper Article and Quotes a Letter from Former Commissioner Mundell Regarding a 2008 Sewer System Overflow Adjacent to Queen Creek Wash, But Mr. Ashton Has No Direct Personal Knowledge of the Matter and Simply Repeats What He Has Read.

Section III(B) of the Ashton Testimony discusses and attaches as Exhibit DA-4 a June 11, 2008, East Valley Tribune article regarding a sewer system overflow ("SSO") at a Johnson Utilities lift station in a subdivision adjacent to Queen Creek Wash. When

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[13] *Id.* at lines 5-24.
[14] *Id.* at page 8, lines 5-24.

asked at page 16 of his testimony whether Johnson Utilities "discharged raw sewage into a neighborhood wash," Mr. Ashton responded: "I have not personally been involved with this matter, but published reports are that it did."[15] Mr. Ashton then goes on to paraphrase portions of the article. Next, Mr. Ashton quotes from Exhibit DA-5 of his testimony, which is a letter dated June 10, 2008, from former Commissioner Mundell to fellow commissioners regarding the SSO. The article and the Mundell letter are the sum total of Mr. Ashton's personal knowledge regarding the SSO. Because Mr. Ashton admittedly does not have direct personal knowledge regarding the SSO, he is not competent to present testimony regarding the subject matter of the article. Moreover, the June 11, 2008, article is hearsay, and Johnson Utilities has no opportunity for cross-examination on the contents of the article. For these reasons, Exhibit DA-4 and the Ashton Testimony quoting and paraphrasing Exhibit DA-4 and DA-5 at page 16, line 9, through page 17, line 15, should be stricken.

D. Defamation Action—Section III(C) of the Ashton Testimony Paraphrases a Newspaper Article Regarding a Defamation Action Filed by Johnson Utilities Against Customers Who Disseminated Bottles of Brown Water Allegedly from the Company's Water System Bearing False and Misleading Labels.

Section III(C) of the Ashton Testimony discusses and attaches as Exhibit DA-6 a June 27, 2008, East Valley Tribune article regarding a lawsuit filed by Johnson Utilities against customers who are believed to have disseminated bottles of brown water allegedly from the Company's water system bearing false, misleading and potentially alarming labels. However, other than reading the article, Mr. Ashton has no direct personal knowledge regarding the defamation litigation, so he is not competent to present testimony regarding the subject matter of the article. Without first-hand knowledge, Mr. Ashton's testimony regarding the defamation action and the alleged motivation of

[15] *Id.* at page 16, lines 11-22.

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Johnson Utilities in filing the action is pure speculation and conjecture. On top of that, the heading in the Ashton Testimony that George Johnson harassed customers with "frivolous defamation lawsuits" is inflammatory and prejudicial. In addition, the June 27, 2008, article is hearsay, and Johnson Utilities has no opportunity for cross-examination on the contents of the article. For these reasons, Exhibit DA-6 and the Ashton Testimony based upon Exhibit DA-6 at page 17, line 16, through page 18, line 6, should be stricken.

E. Storage of Sewage Sludge—Section III(D) of the Ashton Testimony Paraphrases a Newspaper Article Regarding a the Storage of Sewage Sludge at Johnson Utilities' Section 11 Wastewater Treatment Plant.

Section III(D) of the Ashton Testimony discusses and attaches as Exhibit DA-7 an October 28, 2008, East Valley Tribune article regarding an alleged violation of rules by Johnson Utilities for storing sewage sludge at the Company's Section 11 wastewater treatment plant ("Section 11 WWTP"), an allegation which Johnson Utilities has vigorously contested. Like so much of his testimony before, other than reading the article, Mr. Ashton has no first-hand knowledge about the storage of sewage sludge at the Section 11 WWTP or the subject matter of the article, so he is not competent to present testimony on the matter. By his own admission, Mr. Ashton's testimony is "[b]ased on published reports."[16] How then, for example, is he competent to testify that "Utility dumped 34,713 gallons of the sludge in trenches mixed with construction debris?"[17] Moreover, the June 27, 2008, article is hearsay, and Johnson Utilities has no opportunity for cross-examination on the contents of the article. For these reasons, Exhibit DA-7 and the Ashton Testimony based upon Exhibit DA-7 at page 18, lines 7-16, should be stricken.

[16] *Id* at page 18, line 12.
[17] *Id.* at lines 14-15.

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F. **Environmental Violations and Fines—Section III(E) of the Ashton Testimony Alleges Other Violations of Environmental Laws by Johnson Utilities, Citing Information on the Arizona Department of Environmental Quality Website and Exhibit DA-2.**

Section III(E) of the Ashton Testimony includes two citations to the ADEQ website regarding fines paid by Johnson Utilities. Mr. Ashton also cites the Phoenix Magazine article attached as Exhibit DA-2 as support for another fine paid by the Company. Mr. Ashton has no direct personal knowledge regarding any of the fines identified in his testimony, so he is not competent to present testimony regarding the fines. Moreover, as discussed above, the Phoenix Magazine article is hearsay, and Johnson Utilities has no opportunity for cross-examination on the contents of the article. Further, the discussion at page 19 of the Ashton Testimony regarding Mr. Ashton's opinion about Mr. Johnson's response to the fines is pure speculation and conjecture, not to mention inflammatory and prejudicial. Mr. Ashton's involvement with Johnson Utilities did not begin until the very end of 2004. The fines referenced in his testimony were in 2001 and 2003. With no first-hand knowledge, Mr. Ashton is in no position to testify about Mr. Johnson's response or the Company's response to fines. For these reasons, Exhibit DA-2 and the Ashton Testimony at page 18, line 1, through page 19, line 12, should be stricken. In the event the Commission elects to take official notice of the information cited by Mr. Ashton on the ADEQ website for whatever evidentiary value it may have, the ADEQ information stands on its own without the need for any testimony by Mr. Ashton.

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G. Test Year—Section III(G) of the Ashton Testimony Alleges that Johnson Utilities Should Have Filed its Rate Case Using a 2006 Test Year, Despite the Fact that the Commission's Utilities Division Staff Accepted the Rate Case Filing Based Upon a 2007 Test Year and Found the Filing Sufficient.

Despite the fact that (i) Johnson Utilities received authorization to file its rate case by March 31, 2008, using a 2007 test year in a letter from the Commission's Chief Counsel to the Company dated September 18, 2008, and (ii) the Commission's Utilities Division accepted the filing and found the rate case application sufficient in a letter dated August 1, 2008, Mr. Ashton provides what amounts to a legal opinion (albeit, from a non-lawyer) that the Company did not comply with Decision 68235, which ordered the Company to file a rate case in 2007 using a 2006 test year. SFG previously raised this argument at the Procedural Conference held January 27, 2009, and the Administrative Law Judge ruled that the issue was a legal issue and not a factual discovery issue, stating:

> Mr. Marks, I would say that you probably have a legal argument to make on this issue, and you are free to make it. It [the rate case application] has been found sufficient. And if, if there is an argument that Swing First has with the Commission's process, then you are certainly free to make those arguments.[18]

The record is clear regarding the test year. Johnson Utilities filed a rate case using a 2007 test year. The Commission's Utilities Division accepted the filing and found it to be sufficient. Mr. Ashton is not an attorney, he is not familiar with Commission practice, and he is not competent to provide testimony regarding Decision 68235 or the appropriate test year. An argument that Johnson Utilities filed with the incorrect test year is an argument that must be made (if it is to be made at all) by Mr. Ashton's legal counsel. Accordingly, Section III(G) of the Ashton Testimony should be stricken at page 19, lines 22-25, through page 20, lines 1-7.

[18] Transcript at page 42, lines 21-25, and page 43, line 1.

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H. Affiliate Transactions—Section III(H) of the Ashton Testimony Alleges that Johnson Utilities Has Engaged in Illegal Affiliate Transactions.

In Section III(H), Mr. Ashton provides testimony based upon his "understanding" of A.R.S. § 40-334(A), and alleges that Johnson Utilities has violated this statute. However, Mr. Ashton is not an attorney, is not familiar with Commission practice, and is not competent to provide testimony regarding whether or not Johnson Utilities has complied with A.R.S. § 40-334(A). That is an argument that must be made—if it is to be made at all—by Mr. Ashton's legal counsel.

In addition, Mr. Ashton testifies that he "know[s] of many occasions where Utility has favored other George Johnson companies"[19] but provides no evidence to support the allegation. What's worse, Mr. Ashton testified that Johnson Utilities reimbursed SFG for certain expenses of the Oasis golf course and paid for the transfer of the Oasis golf course liquor license by SFG with checks drawn on Johnson Utilities' account when Mr. Ashton knows that the testimony is not true. A copy of a check in the amount of $23,000 drawn on the account of The Club at Oasis, LLC, made payable to Swing First Golf was attached to Johnson Utilities' Motion for Summary Judgment in the complaint case (Docket WS-02987A-08-0049), filed December 4, 2008 (two months prior to the date of Mr. Ashton's testimony). The check attached to the Motion for Summary Judgment clearly contradicts Mr. Ashton's testimony that "Swing First was reimbursed for Oasis Golf Course expenses by checks drawn on Utility" and "Utility paid for the transfer of the Oasis Golf Course liquor license from Swing First."[20] Mr. Ashton failed to attach copies of the checks he referenced to his testimony. For these reasons, Section III(H) of the Ashton Testimony should be stricken at page 21, line 4, through page 22, line 3.

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[19] Ashton Testimony at page 21, lines 14-15.
[20] *Id.* at lines 19-21.

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IV. MR. ASHTON IS NOT QUALIFIED TO RENDER EXPERT TESTIMONY IN THE RATE CASE, TO DRAW THE CONCLUSIONS HE DRAWS, OR TO MAKE RECOMMENDATIONS.

Mr. Ashton is the manager of SFG and Vice President of Business Development for KDS, which provides an on-line software system to manage and reduce corporate travel and expense reporting costs.[21] He testifies that he has degrees in International Relations and Chinese and an MBA.[22] However, nowhere in his testimony does Mr. Ashton describe any education or experience which qualifies him as an expert in rate cases, cost of service or rate design. Nor is he in any way qualified to render opinions on subject areas in his testimony including Arizona and Commission policy on golf course irrigation, compliance with tariffs, compliance with Arizona law, and compliance with Commission practices and procedures. In addition, many of the conclusions and recommendations set forth in Mr. Ashton's testimony pertain to utility ratemaking principles, practices and procedures—matters which he is unqualified to address. Accordingly, his recommendations that go to ratemaking (including, for example, whether Johnson Utilities is "over-earning" and his request for ratepayer refunds) and that are based on legal conclusions regarding the Commission's jurisdiction in a rate case should be stricken or, at most, considered as public comment and not given the weight of evidence.

Specifically, Mr. Ashton makes nine recommendations in his testimony on pages 22 and 23. Each of the recommendations are discussed below.

A. Recommendation 1: Johnson Utilities should not be allowed to increase its rates until its management and financial practices are investigated.

As discussed above, the Arizona Constitution requires the Commission to "prescribe just and reasonable classifications to be used and just and reasonable rates and

[21] *Id.* at page 1, lines 6-8.
[22] *Id* at lines 20-22.

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charges to be made and collected, by public service corporations within the State for service rendered therein...." Ariz. Const. art. XV, § 3; see also A.R.S. § 40-361(A). It follows that "the Commission is constitutionally mandated to set fair rates of return on fair value base of public service utilities." *Arizona Corp. Comm'n. v. Citizens Utilities Company*, 120 Ariz. 184, 188, 584 P.2d 1175, 1179 (Ariz. Ct. App. 1978) (citing Ariz. Const. art. XV, §§ 3, 14). Johnson Utilities has properly filed its rate application pursuant to the Commission's rigorous rules and procedures. As part of its thorough review of the application, the Commission already analyzes all aspects of the Company's operations, including management and financial practices, which impact rates and ratepayers. In other words, an investigation of management and financial practices is a rate case. Moreover, SFG's recommendation that the Commission require Johnson Utilities to fund "independent and financial audits" of the Company as well as any of Mr. Johnson's companies that have dealings with Johnson Utilities is offered without any legal authority or Commission precedent, and is quite simply ridiculous.[23] Further, Mr. Ashton does not have any expertise in utility management or utility financial practices and is, therefore, unqualified to make the recommendation. Thus, recommendation 1 on page 22 and the corresponding testimony at page 23, line 9, through page 25, line 11, should be stricken.

B. Recommendation 2: Johnson Utilities should be required to immediately reduce its water rates and refund its overcharges for the last two years.

There are several fatal defects with SFG's recommendation 2. First, Johnson Utilities' rates and charges were authorized in Decision 60223 issued May 27, 1997. The pending rate case is the first rate case for Johnson Utilities since the initial rates and charges were approved in 1997. Because the current rates are initial rates, Johnson

[23] *Id.* at page 24, lines 6-11.

Utilities does not have an authorized rate of return. Therefore, the Company cannot be "overcharging" its water customers as alleged in the Ashton Testimony.[24] There are no overcharges to be refunded.[25]

Second, there is absolutely no legal basis to support an order that Johnson Utilities refund water rates collected during the last two years. SFG's assertion that the Company should refund monies to customers is based upon the flawed argument that Johnson Utilities should have filed a rate case in 2007 using a 2006 test year.[26] As discussed above, Johnson Utilities received written authorization to file its rate case in 2008 using a 2007 test year. The Commission's Utilities Division accepted that rate case filing with a 2007 test year and found the filing sufficient in a letter dated August 1, 2008. In any event, the argument regarding the proper test year is a legal argument, and not one that can be raised by Mr. Ashton.

Third, there is no factual or legal basis to support the requested immediate reduction in water rates to the levels proposed by Johnson Utilities in its rate case.[27] As stated above, Mr. Ashton does not have any expertise in utility management or utility financial practices, and he is unqualified to make his recommendation 2. Thus, recommendation 2 on page 22 and the corresponding testimony at page 25, line 12, through page 26, line 14, should be stricken.

C. Recommendation 3: Johnson Utilities should be required to refund–in cash, not credits–its illegal superfund tax collections.

Of all of the irrelevant testimony presented by SFG, its issue regarding the pass-through and collection of Water Quality Assurance Revolving Fund taxes ("WQARF" taxes, also known as superfund taxes) is the one issue that might properly be considered

[24] *Id.* at page 25, lines 17-23.
[25] SFG's allegation that it has been overcharged for effluent and CAP water at its golf course is a different issue, and one that will be addressed in the complaint case. SFG's argument in the Ashton Testimony is that Johnson Utilities should refund rates collected because it did not file using a 2006 test year. This argument has no merit.
[26] Ashton Testimony at page 25, lines 17-23 and page 26, lines 2-4.
[27] *Id.* at page 25, lines 24-25.

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in the rate case. That being said, it is still not a proper subject for witness testimony because the issue is a pure question of law, not of fact. Whether Johnson Utilities may "pass through" the WQARF tax is an issue for legal briefing by the parties, and it does not require witness testimony. Mr. Ashton is not an attorney, so his statements or opinion regarding the legality of the pass-through are entirely irrelevant. For the record, Johnson Utilities believes in good faith that its pass-through and collection of WQARF taxes from its customers is consistent with Arizona law and the Company's tariffs. For these reasons, recommendation 3 on page 22 and the corresponding testimony at page 19, lines 13-21, and page 26, lines 5-11, should be stricken.

D. Recommendation 4: Johnson Utilities' Pecan Wastewater Treatment Plant should not be included in rate base.

Mr. Ashton does not have any expertise or training in utility accounting or the inclusion/exclusion of utility plant from rate base which would qualify him to make recommendation 4 regarding the disallowance of the Pecan Wastewater Treatment Plant ("Pecan WWTP") from rate base until a future rate case. In addition, there has never been a finding at the Commission or at ADEQ that the Pecan WWTP is a threat to public safety, or that the plant is not operating properly, and Mr. Ashton has provided no reliable evidence to support his assertions.[28] In fact, Mr. Ashton readily admits in his testimony that he has no direct personal knowledge regarding the Pecan WWTP, and his testimony is based on articles in the newspaper.[29] For these reasons, recommendation 4 on page 22 and the corresponding testimony at page 26, lines 12-19, should be stricken.

. . . .

. . . .

[28] *Id.* at page 26, lines 12-19.

[29] Regarding the SSO at the Pecan WWTP, Mr. Ashton admits that "I have not personally been involved with this matter" and acknowledges that his testimony is "based on published reports." *See* Ashton Testimony at page 16, lines 13 and 20.

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E. Recommendation 5: Johnson Utilities should be required to dismiss all pending defamation lawsuits against its customers, pay all of their court costs and legal fees, and apologize to each customer.

There is absolutely no legal authority or precedent for this recommendation. It is nothing more than a self-serving attempt by Mr. Ashton to avoid defending a lawsuit in which he finds himself a party. He summarily labels the referenced lawsuits as harassment without so much as a word of explanation regarding the bases for the lawsuits. Further, the Commission lacks authority to order a party to pay the legal fees of another party in an action pending in Superior Court. Mr. Ashton knows this, or at least he should know this. For these reasons, recommendation 5 on page 22 and the corresponding testimony at page 26, line 20, through page 27, line 16, should be stricken.

F. Recommendation 6: Johnson Utilities should be fined for its blatant disregard of its public service obligations, environmental laws, and explicit commission orders.

Mr. Ashton asserts that the Commission should fine Johnson Utilities so that it cannot continue to "abuse customers, ignore Commission orders, and endanger public health and safety."[30] Although it is not clear, the alleged abuse of customers appears to arise out of the claims that SFG has filed against Johnson Utilities in the complaint case or the defamation suits related to two separate incidents (one involving Mr. Ashton). Both of these claims have been addressed above and will not be discussed again. The allegation that Johnson Utilities has ignored Commission orders appears to arise out of SFG's claims that Johnson Utilities should have filed a rate case in 2007 using a 2006 test year, based upon Decision 68235, or that the Company should not have passed through WQARF taxes to customers, based upon Decision 64598. These claims have also been discussed above and will not be discussed again. Finally, SFG's claim that Johnson Utilities has endangered public health and safety is simply without merit, as discussed

[30] Ashton Testimony at page 27, lines 22-23.

above. For these reasons, recommendation 6 on page 22 and the corresponding testimony at page 27, line 17, through page 28, line 4, should be stricken.

G. Recommendation 7: Johnson Utilities should be penalized with a reduced return on equity.

Like the other recommendations contained in the Ashton Testimony, there is simply no basis penalizing Johnson Utilities by reducing its return on equity. Such action would run afoul of the Commission's constitutional mandate to "set fair rates of return on fair value base of public service utilities" as discussed above. Mr. Ashton's recommendation 7 on page 22 and the corresponding testimony at page 28, lines 5-10, should be stricken.

H. Recommendation 8: Following the completion of the independent management and financial audits, the commission should require Johnson Utilities to demonstrate why it should not surrender its certificate of convenience and necessity.

The Commission does not have authority in a rate case proceeding to order a utility to surrender its CC&N. In order for the Commission to pursue a deletion of a utility's CC&N, it must comply with A.R.S. § 40-252 and the requirements of *James P. Paul Water Company v. Arizona Corporation Commission*, 137 Ariz. 426, 671 P.2d 404 (1983). The rate case has not been noticed as an A.R.S. § 40-252 deletion proceeding, nor has SFG demonstrated the requisite elements for the deletion of a CC&N as set forth in *James P. Paul.* Accordingly, SFG's recommendation 8 on page 23 and the corresponding testimony at page 28, lines 11-22, should be stricken.

I. Recommendation 9: The Commission should bifurcate this case into two phases.

SFG's recommendation 9 pertains to the implementation of phased process to accommodate its recommendations 1-8. Because recommendations 1-8 should be stricken for the reasons set forth above, recommendation 9 on page 23 and the

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corresponding testimony at page 28, line 23, through page 29, line 20, should likewise be stricken.

V. SFG's MOTION FOR LEAVE TO FILE THE SUPPLEMENTAL TESTIMONY SHOULD BE DENIED.

The Supplemental Ashton Testimony pertains to matters that are far outside the scope of this rate case. SFG continues to inappropriately use the rate case as a vehicle to bolster its position in the complaint case and to further escalate its dispute with Johnson Utilities. The Supplemental Ashton Testimony runs far afoul of the establishment of just and reasonable rates and charges, which is the purpose of the rate case. Instead, SFG continues to interject additional extraneous issues to advance its own position, which does not further the public interest. Accordingly, the SFG's Motion for Leave to file the Supplemental Ashton Testimony should be denied.

VI. CONCLUSION.

Although SFG could have filed testimony which addressed relevant rate case issues, it has chosen to file page after page of inflammatory and unsupported allegations, misstatements of fact, and irrelevant hearsay, all of which is apparently intended to create leverage in SFG's complaint against Johnson Utilities. Commission rate case procedures require direct testimony to be pre-filed in the public docket, and interested parties who are impacted or potentially impacted by the proceeding may intervene to protect their interests. The Commission should not, however, allow any party to abuse this procedure by filing testimony and introducing into the public docket, self-serving, irrelevant hearsay and inflammatory testimony that does not further the work of setting just and reasonable utility rates. Intervention does not grant an unfettered license to say whatever a party wants to say in testimony. Rather, the Commission must find an appropriate foundational basis that is supported by relevant facts from a credible witness who is legally competent to give such testimony. It is clear from the Ashton Testimony that the purpose and intent

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of SFG is not a dissemination of relevant information to assist the Commission in discharging its constitutional duties, but to publically denigrate, prejudice, and harm Johnson Utilities in the rate case, while simultaneously attempting to bolster its position in its complaint case. Accordingly, despite the uncommon nature of this request, the Ashton Testimony should be stricken.

Alternatively, because the Ashton Testimony contains hearsay and anecdotal comments and newspaper articles lacking in foundation, the Commission should strike the Ashton Testimony as evidence in the rate case and consider it as public comment. If the Commission is still inclined to allow SFG to file testimony in this case, it should require SFG to re-file its direct testimony within five (5) days from the date of its procedural order to address only those issues that are relevant to a rate case, supported by proper foundation and compliant with the rules of evidence.

Finally, for the reasons set forth herein, SFG's Motion for Leave to File the Supplemental Ashton Testimony should be denied.

RESPECTFULLY SUBMITTED this 19th of February, 2009.

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